

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re)	
)	
Broadcast Indecency Complaints)	GN Docket No. 13–86; DA 13–581
)	

TO: Secretary Marlene Dortch
ATTN: The Enforcement Bureau and General Counsel

COMMENTS ON BROADCAST INDECENCY

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I. INTRODUCTION

The following comments are in response to the *Public Notice* issued on April 1, 2012 by the Federal Communications Commission’s (“FCC” or “Commission”) Enforcement Bureau and General Counsel concerning application and enforcement of current broadcast indecency policies.¹

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving religious liberties. *See, e.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009) (unanimously holding that a monument erected and maintained by the government on its own property constitutes government speech and does not create a right for private individuals to demand that the government erect other monuments); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb’s Chapel v. Center*

¹ 78 Fed. Reg. 23563, published April 19, 2013. The final time for public comments was extended until

Moriches Sch. Dist., 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities).

ACLJ supports the Commission's policies and efforts designed to protect the public from the harmful effects of indecent material. The Commission should continue to enforce its current indecent broadcast policies. At the same time, however, in recognition of the technological changes that have taken place in the media marketplace, broadcasters should also be given a higher level of First Amendment scrutiny and protection, values which enhance our democracy and serve the public interest.

II. FACTUAL BACKGROUND

The FCC derives its regulatory authority over indecent broadcasts from 18 U.S.C. § 1464.² An indecent broadcast is one that includes “language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory organs or activities.”³ When the FCC looks at indecent broadcast complaints, the context in which the indecent material appears is an important factor in determining whether a violation has occurred.⁴ The FCC's broadcast indecency policies

June 19, 2013. 78 Fed. Reg. 34099, published June 6, 2013.

² 18 USC § 1464 (“Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both”).

³ *FCC v. Pacifica*, 438 U.S. 726, 732 (1978).

⁴ Obscene, Indecent and Profane Broadcasts, Federal Communications Commission, www.fcc.gov/guides/obscenity-indecency-and-profanity (Last visited June 11, 2013).

apply to broadcast television and radio during the hours of 6 AM to 10 PM.⁵ The prohibitions apply during this time period because it encompasses the times when children will most likely be watching.⁶

In assessing potential violations of the indecency policies, the FCC has taken two approaches: (1) the repeated, egregious use of expletives constitutes a violation and (2) isolated expletives can be in violation of the broadcast regulations. The FCC's current approach to determining whether the use of isolated expletives constitutes a violation is that the "mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material . . . is not indecent."⁷ Thus, broadcasters can be fined not only for the use of egregious, repeated expletives, but also for the use of isolated expletives.

In April of 2013, in response to the Supreme Court's decision in *FCC v. Fox Television Stations, Inc.*, the FCC dismissed seventy percent of the over one million complaints it received since 2012.⁸ Additionally, the FCC sought public comments on whether it should continue to enforce its current broadcast indecency policies.⁹

⁵ *Id.*

⁶ *Id.*

⁷ *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 FCC Rcd. 19859 (2003).

⁸ FCC Reduces Backlog of Broadcast Indecency Complaints By 70% (More Than One Million Complaints); Seeks Comment on Adopting Egregious Cases Policy, 78 Fed. Reg. 23563 (Apr. 19, 2013), *available at* <http://www.fcc.gov/document/fcc-cuts-indecency-complaints-1-million-seeks-comment-policy>.

⁹ *Id.*

III. LEGAL ANALYSIS

A. The FCC Has the Power to Regulate Indecent Broadcasts and Such Regulations are Constitutional

Not only can the State regulate displays of public nudity, but the State can also properly regulate indecent broadcasts. Public nudity is “traditionally subject to indecent exposure laws,”¹⁰ and all fifty states regulate such exposure through public indecency laws. As such, the Court has upheld bans on public indecency.¹¹

An indecent television broadcast is the equivalent of an indecent public display. Just as the State can prohibit public nudity,¹² the State can prohibit an individual from walking around carrying a video of someone nude. Accordingly, the State can prohibit broadcasting programs with nudity into people’s homes. Thus, the FCC’s broadcast indecency policies are lawful government restrictions just like restrictions on other forms of indecent exposure. Significantly, the State’s ability to prohibit indecent broadcasting does not depend on the standard of review applied to broadcast media. Rather, the State’s ability to prohibit indecent broadcasting reflects the Supreme Court’s consistent recognition of the State’s authority in this area.

B. The FCC Should Continue Enforcing its Current Broadcast Indecency Policies

The FCC should continue to apply its current policies and prohibit the broadcasting of indecent material. Specifically, the FCC should not limit enforcement of its indecency regulations merely to egregious offenses, but should continue to enforce isolated instances of

¹⁰ *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 22 n.7 (1975).

¹¹ *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Erie v. Pap’s A.M.*, 529 U.S. 277 (2000).

¹² *Roth v. United States*, 354 U.S. 476, 512 (1957) (Douglas, J., dissenting) (“No one would suggest that the First Amendment permits nudity in public places”).

indecenty, and should enforce isolated instances of nudity under the same standard applied to isolated expletives.

The FCC needs to continue enforcing its current broadcast indecency policies as broadcast media is “demonstrably a principal source of information and entertainment for a great part of the Nation's population.”¹³ Broadcast media and the material it conveys can “intrude on the privacy of the home without prior warning.”¹⁴ The FCC should not overlook instances of isolated expletives as such material can provide “verbal shock treatment.”¹⁵ Moreover, the shock of being exposed to even a fleeting instance of nudity or an isolated expletive is like “the first blow” that cannot be cured by “run[ning] away.”¹⁶

Expletives and nudity can not only shock the audience, but such material has a particularly profound impact on children.¹⁷ Children learn many social norms from watching television and from listening to their parents.¹⁸ Being exposed to nudity and profanity can negatively impact children and affect their future behavior.

Moreover, the Court has declared numerous times that the government has a compelling interest in protecting children from indecency.¹⁹ By allowing increased instances of indecency to

¹³ *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 663 (1994) (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968)).

¹⁴ *Sable Communications v. FCC*, 492 U.S. 115, 127 (1989).

¹⁵ *Pacifica*, 438 U.S. at 761 (Powell, J., concurring).

¹⁶ *Id.* at 749.

¹⁷ *Facts and TV Statistics*, Parents Television Council, <http://www.parentstv.org/PTC/facts/mediafacts.asp>.

¹⁸ *Wolves in Sheep's Clothing A Content Analysis of Children's Television*, A Parents Television Council Special Report, Mar. 2, 2006, <http://www.parentstv.org/PTC/publications/reports/childrensstudy/childrensstudy.pdf>

¹⁹ *Denver Area Educ. Telecomms. Consortium v. FCC* [“DAETC”], 518 U.S. 727, 755 (1996) (opinion of Court per Breyer, J., joined by Stevens, O'Connor, Kennedy, Souter, & Ginsburg, JJ.) (“We agree with the Government that protection of children [from indecency] is a ‘compelling interest’”); *id.* at 773 (Stevens, J., concurring) (“the Government may have a compelling interest in protecting children from indecent speech on such a pervasive medium [as cable 4 TV]”); *id.* at 779 (O'Connor, J., concurring) (recognizing a “well-established compelling interest of protecting children from exposure to indecent material”); *id.* at 804 (Kennedy, J., joined by Ginsburg, J.) (acknowledging the “weighty” concern that “[t]he householder should not have to risk that offensive material come into the hands of his children before it can be stopped”) (internal editing and quotation marks)

go unenforced on broadcast networks, parents will no longer have widely available family-friendly television options for their children. Therefore, the FCC should continue applying and enforcing its current broadcasts indecency policies.

C. Broadcasters should be subject to a higher standard of judicial review and the FCC’s broadcast indecency policies meet this level of review

In 1978, in *FCC v. Pacifica*, the Supreme Court applied rational basis analysis when reviewing the FCC’s broadcast regulations. However, the Court’s decision should be reevaluated in light of the “[t]ime, technological advances, and the FCC’s untenable rulings.”²⁰ Since the Court’s ruling in *Pacifica*, media has made significant advancements. As such, the “communications marketplace today bears little resemblance to that which existed at the time major communications law decisions of the twentieth century were rendered by the Supreme Court.”²¹ Broadcast media is no longer the only pervasive form of media entering the homes of Americans.

The average American is inundated with many other forms of media. Viewers are now able to watch the same show that they watched on a broadcast channel on the Internet or on a cable channel. Accordingly, broadcast media should be afforded the same level of First Amendment protections given to other equally available forms of media like Satellite radio, cable television, and the Internet.²² Thus, broadcast media should be subject to a higher standard of review than was originally applied in *Pacifica*.

omitted); *id.* at 806 (“Congress does have . . . a compelling interest in protecting children from indecent speech”); *id.* at 832 (Thomas, J., joined by Rehnquist, C.J., & Scalia, J.) (recognizing “well established compelling interest” in protecting minors from indecency); *see also Sable Communications*, 492 U.S. at 136 (“We have recognized that there is a compelling interest in protecting the physical and physiological well-being of minors”).

²⁰ *FCC v. Fox TV Stations, Inc.*, 132 S. Ct. 2307, 2321 (2012) (Ginsburg, J., concurring).

²¹ Randolph J. May, *Charting a New Constitutional Jurisprudence for the Digital Age*, 3 CHARLESTON L. REV. 373, 375 (2009).

²² *Reno v. ACLU*, 521 U.S. 844, 863 (1997) (“[T]he Internet . . . is entitled to ‘the highest protection from

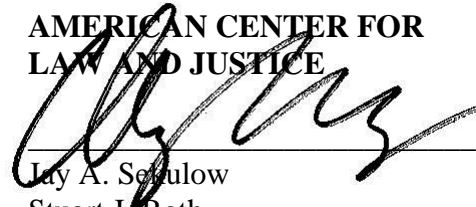
Not only should broadcasters be given a higher level of First Amendment protection, but also the FCC's regulations satisfy this higher level of review. Just as bans on public nudity meet a higher standard of judicial review,²³ bans on indecent broadcasts are also constitutional and meet that same higher level of review. A speaker does not have the right to expose himself while speaking, nor does a network have the right to stream his exposure into people's homes.

Conclusion

To protect the public from the harmful effects of indecent material, the FCC should continue to enforce its current indecent broadcast policies and not relax broadcasting standards. In addition, while broadcasting should be regulated by the FCC's current policies, broadcasters should be given a higher level of scrutiny analysis and First Amendment protection.

Respectfully Submitted,

**AMERICAN CENTER FOR
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governmental intrusion"); *Turner Broadcasting v. FCC*, 512 U.S. 622 (1994) (explaining strict scrutiny applies to cable television).

²³ See *Barnes*, 501 U.S. at 572 (holding a ban on nude dancing constitutional and subject to a higher standard of review).